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No. 82-719

IN THE

Supreme Court of the United States

October Term, 1982

AVONDALE SHIPYARDS, INC.,

Petitioner,

v.

KAISER ALUMINUM & CHEMICAL SALES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONER AVONDALE SHIPYARDS, INC.

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TABLE OF CONTENTS

	Page
REPLY	1
SUPPLEMENTAL APPENDIX:	
Excerpts From Kaiser Amended Complaint	SA1
Excerpts From Avondale Answer and Counterclaim	SA9

REPLY

In its petition, Avondale pointed out that the court below misinterpreted and acted contrary to this Court's decision in *Kaiser Steel Corp. v. Mullins*, 455 U. S. 72 (1982), because it refused to recognize Avondale's antitrust defense even though Kaiser is seeking in this action to enforce an unlawful tying arrangement. Kaiser used its monopoly power over insulation material needed by Avondale to coerce Avondale to buy aluminum tanks from it, and it now is seeking additional payment for the tied tanks.

In its brief in opposition, Kaiser seeks to sidestep the Court of Appeals' error by reinterpreting the factual allegations to suggest that its case against Avondale is unrelated to the tie. *See* Kaiser Brief at 12-13. However, the pleadings, relevant portions of which are attached hereto in a supplemental appendix (designated with pages marked "SA"), make clear that this suggestion is incorrect.*

Essentially, Kaiser's argument is that its action seeks payment for "change work" and that the "changes" somehow were different from the work it was to perform in providing the tied tanks. *See* Kaiser Brief at 12. But the contract under which Kaiser sues provided only that Kaiser was to furnish completed tanks (*see* Kaiser Amended Complaint ¶¶ 4, 7), and the "changes" merely were revisions to the tanks' design (*see id.* ¶¶ 8, 12, 15-18), (SA1-6). The contract's "standard 'changes' clause"

* Because Avondale's defense was stricken on a motion under Federal Rule of Civil Procedure 12(f), the pleadings comprise the full factual record. They should be construed in Avondale's favor. *See, e.g., Radovich v. National Football League*, 352 U. S. 445 (1957).

(Kaiser Brief at 3) merely afforded a means of incorporating the design modifications before manufacture was completed. *See* Kaiser Amended Complaint ¶¶ 8, 9, 11, 14 (SA2-5). Under the contract, any changes were an integral part of Kaiser's "tank work," and Avondale always has contended that the tanks, "changed" or otherwise, are the tied product. *See* Avondale Answer ¶ 63, incorporating Avondale Counterclaim ¶¶ 7-11, 78 (SA10-12).

Citing the Court of Appeals' opinion out of context, Kaiser also suggests that all changes were "commanded" by Avondale as part of a willful decision to add to Kaiser's work. Kaiser Brief at 12-13. But the fact is that many changes, such as those mandated by new governmental requirements (*see* Kaiser Amended Complaint ¶ 8 (SA 2)), were not subject to anyone's free choice. In any event, this disputed fact question is immaterial, for the "change work" was just one part of the "tank work" and Avondale was coerced by the tie to have all of that work done by Kaiser. *See* Avondale Counterclaim, *supra*.

Finally, Kaiser asserts that Avondale does not claim that Kaiser seeks inflated sums for the "changes" portion of the tank work. Kaiser Brief at 12. Paragraph 18 of Avondale's answer (SA9-10) refutes that assertion. The basis for Kaiser's suit is that it demanded payment of invoices based on inflated amounts in its own unilateral cost estimates despite lack of agreement on a "fair and reasonable" price adjustment. *See* Amended Complaint ¶¶ 14, 17-18 (SA4-6). Avondale has refused to pay the unreasonable amounts demanded.

In this action, Kaiser seeks "the balance due" on its contract with Avondale. Kaiser Amended Complaint ¶ 15 (SA5). Nearly $30,000,000 of the "balance" is sought as an additional payment for the tied cargo tanks. *See id.*, Counts 1-3 ("The Tank Claims") (SA5-8). En-

forcement of this demand will enforce the tie itself. By nevertheless allowing Avondale's antitrust defense to be stricken, the court below acted contrary to this Court's decision in *Kaiser Steel*. For this reason, this Court should grant Avondale's petition and summarily reverse.

Respectfully submitted,

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Dated: December 8, 1982

Supplemental Appendix.

EXCERPTS FROM KAISER AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 79-2516

SECTION "D"
MAGISTRATE DIVISION 3

KAISER ALUMINUM & CHEMICAL SALES, INC.

versus

AVONDALE SHIPYARDS, INC.

AMENDED COMPLAINT

The complaint of Kaiser Aluminum & Chemical Sales, Inc., a corporation organized under the laws of the State of California, with respect represents that:

• • •

4.

Kaiser and Avondale on May 25, 1973 entered into a contract (hereinafter referred to as the "Contract", a copy of which is annexed hereto as Exhibit A) pursuant to which Kaiser agreed to furnish materials, to construct and to install five cryogenic tanks for the transportation of liqufied natural gas ("L.N.G.") in each of three ships to

be constructed by Avondale and to furnish and install material to insulate the five cargo holds in each ship with polyurethane foam and glass fibre insulation for the total consideration of SEVENTY MILLION NINE HUNDRED FIFTY-FIVE THOUSAND AND NO/100 ($70,955,000.00) DOLLARS (hereinafter referred to as the "Contract Price"). . . .

• • •

7.

All Contract work was required to be performed by Kaiser in strict compliance with detailed plans, specifications and drawings ("Contract Drawings") which were incorporated in and made part of the Contract, and the Contract Price was bid predicated and agreed upon in reliance on those plans, specifications, drawings and provisions of the Contract as of May 25, 1973.

8.

Article IV of the Contract provides, however, for certain changes in the Contract work, which changes were to be classified as either "essential" or "non-essential". Essential changes were to consist of those due to (a) action of a regulatory body, or promulgation of a new law or rule by a regulatory body after January 1, 1973, or (b) a substantial design improvement which would materially increase the economic life or value of a vessel. All other changes were to be "non-essential".

9.

Article IV provides that Avondale shall have the right to direct Kaiser to perform an "essential" change but that

> Kaiser shall be entitled to a fair and reasonable adjustment in the Contract Price and Contract Performance Dates for the performance of such change and all other terms and conditions of this Contract which

reasonably require modification as a consequence of the change, for performance of such change. Upon receipt of Avondale's written direction of an essential change, Kaiser shall promptly submit to Avondale a detailed estimate of the net increase or decrease in the Contract Price; the effect on weight, and on any item of Kaiser Work; and any delay in each Contract Performance Date to result from such change. Such detail estimate of price (hereinafter called a "Detailed Estimate"), shall consist of estimates separately stated, for materials (by type and quantity), labor (including overhead) based on estimated engineering manhours and estimated production manhours, and profit.

* * *

11.

Progress payments were to be made to Kaiser by Avondale as the work progressed in accordance with the schedule annexed to the Contract. Article IV(g) of the Contract provides that the effect of any change under Article IV which results in an adjustment in the Contract Price and concomitantly in the level of progress payments shall be governed by Article III(e) which states that:

> Any increase or decrease in the Contract Price resulting from a change under Article IV of this Contract shall be deemed a part of the Contract Price for the purpose of determining the level of progress payments under Article III(a) above. Where the increase or decrease in Contract Price is agreed upon prior to commencing performance of a change, the adjustment to progress payments shall be based upon the agreed increase or decrease. Where the increase or decrease in Contract Price has not been agreed upon or determined prior to commencing performance of a change, progress payments shall be based on

Kaiser's estimate of the increase or decrease in the Contract Price due to the change, unless Avondale and Kaiser agree otherwise; provided that at the time the increase or decrease in Contract Price due to the change is agreed upon or determined, an appropriate adjustment in the level of progress payments shall be made to reflect any variance between the estimate and the agreement or determination.

12.

After the Contract was signed but prior to May 14, 1974, Avondale issued successive revised Contract Drawings at different times with notice each time that the Contract work was to be performed in compliance with the latest revised Contract Drawing. . . .

* * *

14.

The level of progress payments to be made under the Contract was predicated upon the Contract Price, and obviously would vary if the Contract Price was either increased or decreased as a result of a change under Article IV of the Contract, the June 4, 1974 or August 2, 1974 agreements. If an increase or decrease in the Contract Price were agreed upon prior to commencing performance of the change, adjustment to progress payments would be based upon the agreed increase or decrease; however, in those instances in which no agreement had been reached prior to commencing performance, progress payments under Article III were to be predicated solely on Kaiser's estimate of the increase or decrease in the Contract Price due to the change in question. The Contract expressly provided that progress payments should be so remitted irrespective of any subsequent agreement or determination as to the ultimate increase or decrease in the

Contract Price as a result of such change. Once an agreement or determination as to the actual cost of the change had been rendered, an appropriate adjustment was to be made in the level of progress payments to reflect any variance between the estimate and the agreement or determination.

15.

This is an action seeking recovery from Avondale for the balance due on the Contract, including changes to the Contract work for additional work performed by Kaiser beyond the scope of the original contract, and for damages incurred by Kaiser as a result of Avondale's breach of contract.

THE TANK CLAIMS

Count One

16.

Plaintiff asserts in this Count claims that relate to that portion of the Contract dealing with construction of the L.N.G. tanks, seeking: (1) payment pursuant to the Contract, subsequent amendments and agreed upon changes thereto for, and recovery of, the increase in Contract Price due to performance of contractual work beyond the original scope of the Contract, and for changes to contractual work performed at the direction of or made necessary by the actions of Avondale; and (2) increase in Contract Price and damages incurred by Kaiser due to delay and disruption to Kaiser's work caused by performance of such additional and changed work.

17.

Commencing with the changes to the panel fabrication and tank assembly work referred to in the June 4,

1974 agreement, a number of "essential", "mandatory" and "non-essential" changes were agreed to and performed by Kaiser with the understanding that Kaiser would receive "a fair and reasonable adjustment in the Contract Price" and that progress payments would be based upon such adjusted Contract Price as contemplated by Articles III and IV of the Contract. No agreement was ever reached between Kaiser and Avondale as to the increase in the Contract Price attributable to the bulk of such changes, but based on the estimates submitted by Kaiser in accordance with Article III of the Contract, an upward adjustment in the progress payments and in the total Contract Price was due and owing.

18.

As actual work on the tanks commenced and progress payments became due Kaiser submitted invoices to Avondale again in accordance with Articles III and IV including in those invoices increased progress payments attributable to the increase in Contract Price predicated on estimate of adjustments due to change order work. Yet, to date, the progress payments made by Avondale include less than ten percent of the face amount of the estimates of the increase in Contract Price due to change order work.

* * *

20.

Accordingly, Kaiser requests this Court to decree that Avondale must pay: (1) The increase in the Contract Price attributable to the performance of such changes and additional work estimated at this time to be an amount of THIRTEEN MILLION, THIRTY-EIGHT THOUSAND SEVEN HUNDRED SEVENTY-ONE AND NO/100 ($13,038,-

771.00) DOLLARS representing the amount of increased progress payments that Avondale was required to but did not make under Article III(e) of the Contract based on Kaiser's estimates of the fair and reasonable adjustment of the Contract Price for performing changes to contract work, all in accord with Article IV of the Contract and the June 4, 1974 and August 2, 1974 agreements, and (2) the cost of financing this work beyond the original scope of the contract; due to Avondale's withholding of progress payments in breach of Article III(e).

COUNT TWO

21.

Avondale also directed Kaiser to do additional work, or informally obtained Kaiser's agreement to do additional work connected with the fabrication and installation of the L.N.G. tanks which was not within the above categories of amendments or changes to tank fabrication work, but which was clearly beyond the original scope of the Contract. Kaiser performed this additional work as directed or agreed to, and forwarded invoices to Avondale for the cost thereof. Some of these invoices were designated as "requested changes."

22.

Accordingly, Kaiser requests this Court to decree that Avondale must now pay Kaiser the increase in the Contract Price attributable to these changes and additional work, in accordance with Articles III and IV of the Contract estimated to be an amount of FIFTY-TWO THOUSAND FOUR HUNDRED FORTY-ONE AND No/100 ($52,441.-00) DOLLARS, plus the cost of financing this extra work outside the scope of the original Contract, due to Avon-

dale's withholding of progress payments in breach of Article III(e) of the Contract.

COUNT THREE

23.

In this Count, Kaiser seeks damages and a "fair and reasonable adjustment" in the Contract Price as a result of the delay in completion of the Contract work caused by the additional time required to peform the changes described in Counts One, Two and Four [an otherwise unquantified "tank claim"] . . . .

• • •

29.

(a) Accordingly, Kaiser respectfully requests this Court to decree that Avondale shall pay Kaiser damages and a "fair and reasonable adjustment" in the Contract Price as a result of delay in completion of the Contract caused by the performance of changes described in Counts One, Two and Four and paragraphs 23-28 of this complaint, which adjustment is estimated at this time to be in the amount of FIFTEEN MILLION, ONE HUNDRED THIRTY-THREE THOUSAND FIVE HUNDRED SEVENTY-TWO AND No/100 ($15,123,572.00) DOLLARS.

(b) In addition, as a result of the aforesaid, the Kaiser operations were disrupted, causing loss of efficiency and increased cost presently estimated to be in the amount of ONE MILLION, FIVE HUNDRED NINETY-EIGHT THOUSAND, SIX HUNDRED EIGHTY-TWO AND No/100 ($1,598,682.00) DOLLARS.

• • •

EXCERPTS FROM AVONDALE ANSWER AND COUNTERCLAIM

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 79-2516

SECTION "L"
MAG. DIV. 3

KAISER ALUMINUM & CHEMICAL SALES, INC.

versus

AVONDALE SHIPYARDS, INC.

ANSWER AND COUNTERCLAIM OF DEFENDANT, AVONDALE SHIPYARDS, INC.

ANSWER

Defendant, Avondale Shipyards, Inc. ("Avondale") answers the Original and Amended Complaints (collectively referred to below as "the Complaints") of plaintiff, Kaiser Aluminum & Chemical Sales, Inc. ("Kaiser"), as follows:

• • •

18. Denied, except Avondale admits that Kaiser has submitted invoices which, Avondale avers, are grossly exaggerated in scope and in amount, bear no relation to the prices paid by Avondale to Kaiser for other work performed under the Kaiser Subcontract, and are not "fair and reasonable" as this term is understood by the parties and as this term is interpreted in the context of the in-

dustry. In any event these sums are exceeded by the amounts due Avondale from Kaiser as set forth below in Avondale's Counterclaim.

• • •

Fourteenth Defense

63. As more fully set out below in paragraphs 1 through 23 and in Count X of Avondale's Counterclaim, Kaiser illegally conditioned its agreement to provide the polyurethane foam insulation upon Avondale's retaining Kaiser also to furnish the aluminum cargo tanks for the three vessels, in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) and Section 3 of the Clayton Act (15 U.S.C. § 14), thereby precluding enforcement of the Kaiser Subcontract as against Avondale.

• • •

COUNTERCLAIM

Avondale, assuming the position of a party plaintiff, asserts the following claims as its Counterclaim against Kaiser:

• • •

7. . . . Kaiser was the only source of polyurethane foam insulation available for use in the Conch II system.

8. Chicago Bridge and Iron Works, Inc. ("Chicago Bridge") and Allied Industries, an affiliate of Brown & Root, Inc. ("Allied Industries") offered to supply Avondale with the cargo tank portion of the Conch II system, but were unable to supply the insulation portion of that system because Kaiser PUF was a proprietary formulation the distribution of which was within Kaiser's exclusive control.

9. Avondale repeatedly requested Kaiser to supply it with separate bids for the insulation portion of the Cargo

Containment System, and for the cargo tank portion of that system, so that Avondale could compare Kaiser's tank bid price with the tank bid prices of Chicago Bridge and Allied Industries, but Kaiser refused to submit such separate bids and refused to supply or install the Kaiser PUF unless it would also be retained to perform the tank work.

10. In addition to and as part of the tying of the tank work to the Kaiser PUF insulation work as described above, Kaiser refused to disclose to Avondale any information with respect to the Kaiser PUF insulation, claiming that it was confidential, proprietary information, and insisted upon the inclusion of provisions in any subcontract by Kaiser which purported to disclaim responsibility for design of the Conch II system and to restrict its liability to Avondale for damages.

11. Because El Paso chose to use the Conch II system, Avondale acceded to Kaiser's demands, and on or about May 25, 1973, after having obtained a license from Conch to use the Conch II System, Avondale, in contemplation of the execution of agreements with El Paso for the construction of the three LNG vessels, entered into a written subcontract with Kaiser, a copy of which is attached to the Complaints as Exhibit A (the "Kaiser Subcontract").

• • •

COUNT X

• • •

78. Kaiser's tying of the cargo tank portion of the Cargo Containment System to the insulation portion of that system, and Kaiser's use of its position as sole supplier of polyurethane foam approved by USCG for use in the Conch II system resulted in Kaiser coercing Avondale to enter into the Kaiser Subcontract, as is more particularly

described in paragraphs 7 through 10 of this Counterclaim, which conduct by Kaiser constituted violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) and Section 3 of the Clayton Act (15 U.S.C. § 14), with the result that Avondale has suffered direct injury to its business and property.

• • •